

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

June 7, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 94-0590-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

FREDDY VIERA,

Defendant-Appellant.

APPEAL from judgments of the circuit court for Kenosha County:
ROBERT C. CANNON, Reserve Judge. *Affirmed.*

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Freddy Viera has appealed from judgments convicting him of one count of robbery in violation of § 943.32(1)(a), STATS., and one count of theft of a domestic animal in violation of § 943.20(1)(a) and (3)(d)1, STATS.¹ The convictions were based on evidence that Viera pulled a kitten from

¹ One of the judgments also convicted Viera of mistreating an animal in violation of §§ 951.02 and 951.18(1), STATS. While Viera indicated in his notice of appeal that he was appealing this conviction as well as the convictions for robbery and theft, he raises no issues related to it in his brief on appeal. The judgment of conviction for mistreating an animal therefore is affirmed.

the arms of Sara Tremear, an eight-year-old girl, chopped its nose with a knife, and threw it against a metal pole, causing it to suffer severe internal injuries.² We affirm the judgments.

On appeal, Viera contends that the trial court erred by refusing to permit him to cross-examine Tremear as to her ownership of the kitten. He contends that cross-examination would have assisted him in demonstrating that the kitten was a stray cat and that Tremear was not its owner. He also contends that the evidence was insufficient to support his convictions because it did not establish Tremear's ownership of the kitten.

Every defendant in a criminal case has a constitutional right to confront his or her accusers. *State v. Echols*, 175 Wis.2d 653, 677, 499 N.W.2d 631, 638, *cert. denied*, 114 S. Ct. 246 (1993). The crux of the right to confrontation is the opportunity for effective cross-examination. *Id.* However, the cross-examination of an adverse witness may be limited by considerations of relevance and materiality. *Id.* at 679, 499 N.W.2d at 639.

Tremear testified that the kitten was a gift to her from Toribia Viera, who lived across the street from Tremear. Three of Tremear's friends lived with Toribia, who was their grandmother and the mother of Viera. Testimony also indicated that Toribia frequently cared for Tremear at the Viera home.

Tremear and her mother testified that Tremear brought the kitten home on June 18, 1993, after the Viera grandchildren indicated that their grandmother would not let them keep it because they could not afford to care for it. Tremear's mother testified that she gave Tremear permission to keep the cat, but told her that she could not bring the kitten into the Tremear home until it was examined by a veterinarian and got its shots. Tremear's mother testified that she insisted that the kitten be examined by a veterinarian before coming inside so that it would not expose the Tremears' other cats to fleas or disease. She testified that because of this concern, she thought it best to keep the

² The kitten subsequently was euthanized by a veterinarian.

kitten on the porch which, although not completely enclosed, was surrounded by an outer wall.

Tremear and her mother testified that Tremear played with the kitten and provided it with dishes of food and water and that the kitten slept underneath the porch. However, Tremear also indicated that the kitten frequently ran back to the Viera home. She testified that the kitten ran there on June 20, 1993, and that she retrieved it from under a bed when she went to the Viera home later that day to be cared for by Toribia. Tremear testified that she subsequently played with the kitten for a couple of hours and was holding it in her arms when Viera, over her objections, pulled the kitten from her and injured it.

During cross-examination of Tremear, defense counsel asked her whether she paid any money for the kitten. After she said that she had not, defense counsel asked Tremear whether she knew where Toribia had gotten the cat. After the prosecutor objected on relevancy grounds, defense counsel argued that the question was relevant to ownership of the kitten and that ownership had to be shown before Viera could be convicted of theft or robbery. The prosecutor then argued that only possession need be shown for a robbery conviction and that only a legal interest need be shown for a theft conviction. After some discussion, the trial court sustained the objection.

The defense subsequently elicited testimony from Toribia indicating that the kitten had occasionally shown up at her home before June 20, 1993, but that she did not own it and never gave it to anyone. In addition, the prosecutor and defense counsel presented the testimony of Viera's sister to the jury by stipulation, indicating that she saw the kitten during weekly visits to the Viera home during the months of May and June 1993, but was of the opinion that it did not belong to Toribia or the Viera household.

Based on this record, we conclude that the trial court committed no reversible error when it determined that further inquiry into Tremear's ownership of the kitten was irrelevant for purposes of the robbery charge.³ To

³ During the argument on this issue, defense counsel contended that further cross-examination concerning ownership under the robbery statute was required. However, near the conclusion of the

convict a defendant of robbery under § 943.32(1)(a), STATS., the State must prove that the defendant took property "from the person or presence of the owner." Section 943.32(1). The term "owner" is defined as "a person in possession of property whether the person's possession is lawful or unlawful." Section 943.32(3). Possession may constitute either actual possession, or constructive possession in the sense of control, dominion or interest in the property. *State v. Mosley*, 102 Wis.2d 636, 645, 307 N.W.2d 200, 206 (1981); *see also* § 971.33, STATS.

It is undisputed that Tremear had the kitten in her arms at the time Viera took it from her. As the person providing food and some form of shelter for the kitten, Tremear was also the only person exercising any custody or control over the kitten or claiming any possessory interest in it. This evidence thus was sufficient to establish that she was an "owner" for purposes of the robbery statute. *See Mosley*, 102 Wis.2d at 645, 307 N.W.2d at 206. In addition, because the evidence indicated that Tremear had possession of the kitten on June 20, 1993, the trial court properly determined that further inquiry into whether she knew who, if anyone, owned the kitten before she brought it home or where the kitten lived before being at the Viera home was irrelevant.

Furthermore, error may not be predicated upon a ruling which excludes evidence unless a substantial right of a party is affected and the substance of the evidence was made known to the judge by offer of proof or was apparent from the context in which the questions were asked. *Echols*, 175 Wis.2d at 679, 499 N.W.2d at 639; § 901.03(1)(b), STATS. In this case, defense counsel never made an offer of proof which informed the trial court as to what information he expected and wished to elicit from Tremear on cross-examination. Because he did not make an offer of proof demonstrating that cross-examination of Tremear would somehow elicit evidence that she was not in possession of the kitten on June 20, 1993, no basis for relief from the robbery conviction has been shown. *See Echols*, 175 Wis.2d at 679, 499 N.W.2d at 639.

(. . . continued)

argument, he also stated: "Robbery is different, granted. It would be irrelevant as far as the robbery statute, but not the theft statute." Based on this statement, we question whether we are required to address the issue of whether cross-examination was properly limited as to the robbery charge or whether the issue was waived for purposes of appeal. However, since the State has not raised waiver on appeal, we will address the merits of the issue.

We also find no reversible error in regard to the theft conviction. To convict Viera of theft, the State had to prove that he took and carried away the "property of another without the other's consent and with intent to deprive the owner permanently of possession of such property." Section 943.20(1)(a), STATS. "Property of another" is defined as "property in which a person other than the actor has a legal interest which the actor has no right to defeat or impair," even if the actor also has a legal interest in the property. Section 939.22(28), STATS.

Viera argues on appeal that the kitten was a stray cat at the time it was injured and that Tremear never acquired a legal interest in it. He contends that the trial court's limitation of cross-examination prevented him from eliciting evidence to establish this fact.

As with the robbery issue, Viera's argument fails because he made no offer of proof indicating that cross-examination of Tremear would have elicited evidence that she had no legal interest in the kitten. At the time of defense counsel's cross-examination, Tremear had already testified that the kitten was given to her by the Vieras as a gift, that her mother had given her permission to keep it, and that she was providing it with food and a place of shelter. This testimony was sufficient to establish that Tremear had a legal interest in the kitten which Viera had no right to defeat or impair and that the kitten thus was "property of another" within the meaning of § 943.20(1)(a), STATS.

We also note that theft is a lesser-included offense of robbery, *Whitaker v. State*, 83 Wis.2d 368, 374, 265 N.W.2d 575, 579 (1978), thus indicating that the ownership interest required for a theft conviction is the same as the possessory interest required for a robbery conviction. As already discussed, the evidence was sufficient to establish ownership under the robbery statute. It therefore follows that the evidence was also sufficient to establish ownership under the theft statute.⁴ Absent an offer of proof demonstrating that

⁴ While the Wisconsin Supreme Court has held that the crime of simple theft is a lesser-included offense of the crime of robbery, *Moore v. State*, 55 Wis.2d 1, 6, 197 Wis.2d 820, 823 (1972), the trial court rejected Viera's claim that the charges against him were multiplicitous. It held that multiplicity did not exist because the theft charge required proof of an additional element, namely, that the property stolen was a domestic animal. This ruling was not challenged on appeal.

evidence would have been elicited on cross-examination which indicated that Tremear had no possessory interest in the kitten, no basis exists for disturbing the judgments of conviction.

By the Court. – Judgments affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.